NO. 20289

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HENRY E. PRATTI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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TOPICAL INDEX

TABLE OF AUTHORITIES

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APPELLEE'S BRIEF

I

JURISDICTION AND STATEMENT OF THE CASE

A. Pre-Trial and Trial Proceedings

On December 2, 1964, the Federal Grand Jury for the Southern District of California returned indictment No. 34322 charging appellant and Lucille Barbara Rodriguez in two counts with violation of Title 21, United States Code, Section 174 - Concealment of Illegally Imported Narcotics and Illegal Sale of Narcotics [C. T. pp. 2-3]. 1/

1/ "C. T." refers to Clerk's Transcript of record.

On December 14, 1964, appellant was arraigned in the United States District Court, at which time an attorney was appointed by the Court to represent the appellant and Lucille Barbara Rodriguez. On the same date both defendants entered pleas of not guilty to the charges set forth in the indictment, and the matter was continued to January 5, 1965, for further proceedings [C. T. p. 4].

On January 5, 1965, a new attorney was substituted for defendant Rodriguez. On motion of the United States Attorney, defendant Rodriguez' plea of not guilty was vacated and the matter as to this defendant was continued to January 18, 1965, for further proceedings. Appellant's jury trial commenced on January 5, 1965, before Honorable Peirson M. Hall [C. T. p. 5].

On January 7, 1965, appellant was found guilty as charged. An information of former conviction was filed and read to appellant. On the same date, appellant was sentenced to the custody of the Attorney General for ten years on Count One and ten years on Count Two, the sentences to run concurrently [C. T. pp. 6, 7, 24].

B. Post-Trial Proceedings.

On January 15, 1965, the Clerk of the District Court received appellant's notice of appeal without the required filing fee. On January 22, 1965, the District Court denied appellant's motions to appeal in forma pauperis and for bail pending appeal. Appellant renewed both motions in this Court. On August 5, 1965, this Court granted the motion to appeal in forma pauperis, and held that the

Notice of Appeal received by the Clerk on January 15, 1965, was timely. On the same date this Court transferred the motion for bail pending appeal to the District Court for determination on the merits. Pratti v. United States, 350 F. 2d 290. Appellant's Notice of Appeal was ultimately filed on November 30, 1965 [C. T. p. 26].

The District Court had jurisdiction to try the case under Title 21, United States Code, Section 174. This Court has jurisdiction to entertain this appeal pursuant to the provisions of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTORY PROVISION

Title 21, United States Code, Section 174 provides in pertinent part:

> "Whoever fraudulently or knowingly . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. . . .
>
> "Whenever on trial for a violation of this section the defendant is shown to have or to have had

possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III

STATEMENT OF FACTS

Defendant was charged in a two-count indictment with knowingly receiving, concealing, selling, and facilitating the concealment. transportation and sale of 10.870 grams of heroin knowing the same to have been illegally imported into the United States.

The Government presented the testimony of Edward M. Eastland, a chemist; Lucille Barbara Rodriguez, who was involved in the transaction; Henry Estrada, the buyer-informant, and Richard D. Rock and Chris V. Saiz, surveilling agents of the Federal Bureau of Narcotics. The defense presented only the defendant, Henry E. Pratti.

The evidence established the following facts. On the evening of August 6, 1964, Estrada, the informant (nick-named Rick), went to Barbara Rodriguez' house looking for her boyfriend, Alfred Hererra. Barbara told Rick that Hererra was in jail and asked what he wanted. Barbara testified that Rick then told her that he was "sick and hurting" and wanted to buy narcotics [R. T. p. 48:8-10]. [2]

2/ "R. T. refers to Reporter's Transcript of record.

Rick denied saying anything more than that he wanted to purchase heroin [R. T. p. 107:15-17]. Rick told Barbara he wanted to buy half an ounce. Barbara, who was not an addict, told Rick that she didn't have any narcotics, but that she might be able to get some by calling a man. Rick asked her what the price would be but she did not know.

Then Rick took Barbara to a phone booth in the parking lot of a nearby market, from which she called the defendant. Barbara had previously called defendant on several occasions asking for narcotics, and each time defendant had refused [R. T. p. 70:21-22; p. 177:12-21; p. 178:11-22]. According to her testimony, she told defendant that Rick was sick and wanted "a piece or half a piece", whereupon defendant told her that the price would be $110 [R. T. p. 49:9-16; p. 101:10-17]. Defendant then told Barbara that he might be able to get some narcotics, and if so he would come over to her house the following morning. Rick testified that after the phone call, Barbara told him the price would be $110 [R. T. p. 108: 1-5]. Rick drove Barbara home and then left to meet with agents of the Federal Bureau of Narcotics.

The following morning, August 7, Rick met with the agents again. They searched him and his car, and then gave him $120 and installed a radio transmitter in his car. From that time until after the sale, Rick's car was under constant surveillance by the agents.

Rick then drove to Barbara's house again. He went in and asked if defendant had shown up. She said no; Rick suggested that they call him and she agreed. They drove over to the parking lot.

She called defendant from the phone booth, but there was no answer. Rick then suggested they go over to defendant's house and Barbara again agreed. They drove to defendant's house in Rick's car, bringing along Barbara's three children. When they arrived at defendant's house, Barbara went in while Rick waited in the car. Barbara testified she again told defendant that she had a sick friend, and also told him she wanted some narcotics for her boyfriend. Defendant told her he had nothing there, but he might be able to do something if they went into downtown Los Angeles with him. When they came out of the house Barbara introduced defendant to Rick as Hank [R. T. p. 49:24-25; pp. 75-80; pp. 111-115; pp. 137-143, pp. 161-179].

Defendant drove in his car to Fourth and Crocker Streets in Los Angeles; Barbara and Rick followed in Rick's car. Defendant parked in the vicinity of Fourth and Crocker Streets at which time he informed Barbara and Rick that he was going to look for his contact. Shortly thereafter defendant returned and stated he couldn't find him. He then drove to Fourth and Central, where he located his connection, who was known as John. According to the testimony of Agent Rock, who was surveilling this scene, John came out of the building at Fourth and Central as soon as defendant drove up, and went right over to defendant's car and talked to him [R. T. p. 145:16-25; p. 146:1-13]. Defendant testified that he told John that he had a friend who wanted to buy Heroin, and that they had $110; in response, according to defendant's testimony, John told defendant that he thought he could get two "quarters" (of an ounce)

for $110 [R. T. p. 181:2-12; p. 201:2-18].

Defendant then drove back to where Barbara and Rick were waiting at Fourth and Crocker Streets, to tell them that the sale was arranged and to get the money. According to defendant's testimony, Barbara had the money when he returned to Fourth and Crocker, and she got into his car without further ado and then gave him the money [R. T. p. 183:5-17]. However, according to the testimony of Barbara, Rick and Agent Saiz, who was listening to the radio transmissions from Rick's car, defendant came over to the car and asked for the money, but Rick refused because he feared getting "burned", that is, losing his money. These witnesses testified that a lengthy conversation between defendant and Rick ensued, in which it was decided that Rick would give defendant the money and Barbara would go with defendant to make the buy, leaving her three children in Rick's custody to guarantee the defendant's return [R. T. p. 54:12-18; p. 82:23-25; p. 83:1-6; p. 117:18-25, p. 118:1-6; p. 164:1-25].

The defendant and Barbara then drove back to Fourth and Central to pick up the connection, John. After defendant and Barbara picked up John, the three of them drove to City Terrace and Alma Streets in Los Angeles. During this trip, defendant was driving; defendant testified that John gave him directions as they drove [R. T. p. 186:7-13], but Barbara testified to the contrary [R. T. p. 84:20-21].

Upon their arrival at City Terrace, John got out of the car and was gone for 10-20 minutes. As he was returning, defendant

got out of the car to meet him. They met at the corner and had a brief conversation. The surveillance agent testified that they appeared to exchange something at this time, and then defendant returned to the car and John walked away [R. T. p. 148:1-18]. In conflict with the testimony of the surveillance agents, the defendant testified that John returned to the car with him, and that John handed Barbara the narcotics and she paid John [R. T. p. 187:1-10]. Barbara's testimony was that she does not remember John's returning to the car with defendant; nor does she remember defendant handing her the narcotics. She denied paying defendant any money [R. T. p. 58:16-19; p. 86:5-25; p. 87:1].

After the transfer was completed, defendant and Barbara drove back to Fourth and Crocker, where Rick was waiting. At Fourth and Crocker Barbara got into Rick's car and gave him the package of narcotics. Although Rick denied it [R. T. p. 130:17-25], defendant and Barbara testified that defendant and Rick decided to go back to Barbara's house where they both would take a fix [R. T. p. 66:6-8; p. 91:1-7; p. 188:4-20]. Defendant drove back to Barbara's house followed by Rick and Barbara. Barbara found that her stepfather was home so the two men could not take their narcotics. Defendant testified that Rick gave him enough narcotics for one fix and then left.

Defendant was arrested on November 2, 1964; Barbara Rodriguez was arrested on November 10, 1964.

IV

QUESTIONS PRESENTED

A. THE DISTRICT COURT GAVE ONE OF DEFENDANT'S REQUESTED INSTRUCTIONS ON ENTRAPMENT, AND DID NOT ERR IN REFUSING TO GIVE THE OTHER.

B. THE EVIDENCE IS SUFFICIENT TO SUSTAIN CONVICTION ON THE GROUND THAT DEFENDANT HAD ACTUAL POSSESSION OF THE NARCOTICS.

C. THE DISTRICT COURT DID NOT ERR INSTRUCTING THE JURY ON CONSTRUCTIVE POSSESSION.

1. Any Objection to This Instruction Was Waived by Failure of Trial Counsel to Object.

2. The Evidence Warranted an Instruction on Constructive Possession.

V

ARGUMENT

A. THE DISTRICT COURT GAVE ONE OF DEFENDANT'S REQUESTED INSTRUCTIONS ON ENTRAPMENT, AND DID NOT ERR IN REFUSING TO GIVE THE OTHER.

Defendant requested two instructions on the issue of entrapment. One was Mathes, "Jury Instructions", 27 F. R. D. 39 (No. 4.12). The other instruction requested (Defense's Proposed No. 2) was taken from United States v. Landry, 257 F. 2d 425, 430 (7th

Cir. 1958), which proposed instruction read as follows:

> "One of the defenses to the charges is that of entrapment. It is the duty of the Government to satisfy you beyond a reasonable doubt that the defendant was not entrapped into committing the acts which, absent the entrapment, constitutes the offenses. If the Government fails to convince you beyond a reasonable doubt that the defendant was not entrapped, into committing the offenses, then you must find the defendant not guilty on both counts of the indictment." [C. T. p. 9].

The Mathes instruction was given [R. T. pp. 279-280] but the special instruction was refused, and defendant made a timely exception [R. T. p. 292:4-21].

The appellant relies heavily on Notaro v. United States, 363 F. 2d 169 (9th Cir. 1966), in urging that the Court erred in refusing to give his proposed special instruction. Appellant's reliance on Notaro is misplaced. In the recent case of Robison v. United States, ___ F. 2d ___ (9th Cir., May 18, 1967, No. 20,752), this Court distinguished Notaro as follows:

> "In strong contrast to the case before us, Notaro distinctly stated his objection to the instruction given, and made timely request . . . that the jury be instructed that if they should 'have any reasonable doubt from the evidence in the case as to whether the defendant

was the victim of an unlawful entrapment, the jury should acquit the accused.' [363 F.2d at 173.] The trial court refused Notaro's specific request so to instruct the jury; and it was this refusal, coupled with the instruction as given over Notaro's objection, that there led to reversal. . . .

"In the case at bar, on the other hand, appellant's only 'objection' to the entrapment instruction as given was: 'We would rather prefer the language in the case of United States v. Sherman.' "

(emphasis added).

In addition, said the court, Notaro involved a very close case of entrapment, while Robison was a strong case for the Government. Thus, as a result of (1) a failure to object to the Mathes instruction, and (2) the fact that the entrapment issue was not a close one, this Court in Robison distinguished Notaro and affirmed.

The instant case falls squarely within the holding in Robison. Both of the key distinguishing factors relied upon by the Court in Robison are also present here. The first one was Robison's failure to "distinctly [state] his objection to the instruction given". Here, not only did defendant not object to the Mathes instruction, he specifically requested it [C. T. p. 8]. Thus, the instant case is considerably stronger for affirmance on this point.

The second distinguishing factor in Robison was the lack of a close question of entrapment. In the instant case, not only is it not a "close question of entrapment", but the evidence failed

completely to raise the existence of entrapment. No inducement of defendant by a government agent to sell narcotics occurred in this case. The record shows that the only discussion concerning the transaction between defendant and the informant prior to the delivery of the narcotics was not one to initiate the transaction, but was limited solely to overcoming the informant's fear of advancing money prior to the receipt of the narcotics [R. T. p. 54:12-18; p. 82:23-25; p. 83:1-6; p. 117:18-25; p. 118:1-6; p. 164:6-25]. This clearly does not constitute entrapment.

Thus, any unlawful entrapment of defendant in this case would have to have occurred through Barbara Rodriguez. Of course, any inducement of defendant by Barbara Rodriguez acting on her own initiative could not constitute unlawful entrapment. The defense of entrapment is available only to prevent the Government from inducing otherwise innocent persons into committing a crime.

Sorrells v. United States, 287 U.S. 435 (1932);

United States v. Sherman, 200 F.2d 880 (2nd Cir. 1952) (L. Hand, Jr.);

Sherman v. United States, 356 U.S. 369 (1958).

In other words, the entrapment defense is concerned solely with the activity of Government agents.

Gonzales v. United States, 251 F.2d 298 (9th Cir. 1958);

United States v. De Alesandro, 361 F.2d 694 (2nd Cir. 1966).

It can hardly be argued that Barbara Rodriguez, who was

originally indicted as a co-defendant in this case [C. T. pp. 2-3], was a Government agent of any sort.

Turning, then, to the informant's relationship with Barbara Rodriguez, the evidence is clear that the informant did no more than present the opportunity for the illegal transaction. The informant came to Barbara's house looking for her boyfriend [R. T. p. 105: 18-23]. He told Barbara he wanted to "score" [R. T. p. 106:1-12]. She replied that she, too, wanted to "score" and that she knew someone who might be selling [R. T. p. 106:14-25; p. 107:1-10]. Thus, calling defendant was entirely Barbara Rodriguez' idea. It was she who spoke to defendant on the telephone [R. T. p. 49:9-10; p. 75:1-9; p. 77:12-23; p. 178:11-22]. And it was she who visited defendant in his home prior to the trip downtown that resulted in the sale [R. T. p. 179:8-24]. While the informant had not even known defendant [R. T. p. 125:10-18], Barbara Rodriguez had known him since April, 1964 [R. T. p. 176:18-20], and had several times asked him to sell her narcotics [R. T. p. 177:12-21; p. 178:11-22]. So if anyone induced defendant to sell narcotics it was Barbara Rodriguez, the defendant's accomplice.

In addition the evidence established that the defendant was not an innocent victim of Rodriguez's requests for narcotics. Defendant had a prior conviction under the narcotics laws [R. T. p. 174:18-24]. Barbara's boyfriend had previously told her to contact defendant for narcotics [R. T. p. 101:6-8]. Defendant quoted a price on the first phone call related to this transaction [R. T. p. 101:10-15]. He was himself a user and had been an addict [R. T.

p. 175:6-14; p. 191:8-14]. And by his own admission, this was not the first time he had been instrumental in arranging sales [R. T. p. 193:13-16].

In addition to the fact that no government agent induced appellant to make the sale of narcotics, there is an equally compelling reason why no issue of entrapment is raised by the evidence.

We would urge that in view of defendant's steadfast denials of guilt throughout his testimony, he was not entitled to any entrapment instruction at all. It is well settled that absent a crime there can be no entrapment, and therefore the defense of entrapment is only available to a defendant who admits committing the unlawful acts charged.

Ortiz v. United States, 358 F. 2d 107 (9th Cir. 1966), cert. denied 385 U.S. 861 (1966), reh. denied 385 U.S. 983 (1966),

Ortega v. United States, 348 F. 2d 874 (9th Cir. 1965);

Ramirez v. United States, 294 F. 2d 277 (9th Cir. 1961).

It follows, then, that if there was any error in the instructions, it was favorable to defendant, insofar as the instructions placed upon the Government an unjustified burden of proof, regardless of what that burden was, to show an absence of entrapment.

B. THE EVIDENCE IS SUFFICIENT TO SUSTAIN CONVICTION ON THE GROUND THAT DEFENDANT HAD ACTUAL POSSESSION OF THE NARCOTICS.

When considering the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the Government.

Barnard v. United States, 342 F.2d 309, 317 (9th Cir. 1965), cert. denied 382 U.S. 948 (1965), reh. denied 382 U.S. 1002 (1966);

Kaplan v. United States, 329 F.2d 561 (9th Cir. 1964);

Papadakis v. United States, 208 F.2d 945 (9th Cir. 1954);

Glasser v. United States, 315 U.S. 60 (1942).

Viewed in that light, the testimony establishes that "Rick" Estrada paid the money to defendant, Pratti, at Fourth and Crocker Streets [R.T. p. 55:5-6; p. 82:23-25; p. 118:10-14; p. 164].

The defendant, Barbara and John drove to City Terrace and Alma Streets in Los Angeles [R.T. p. 186:7-13]. The defendant was driving, Barbara was seated in the middle of the front seat, and John was on the passenger side of the front seat.

John exited the vehicle and was gone for 10-20 minutes. As he was returning the defendant got out of the car without the narcotics. to meet him. They met at the corner and had a brief conversation. The surveillance agent testified that they appeared to exchange something at this time, and the defendant returned to the car and

John walked away [R. T. p. 148:1-18]. Upon their return to Fourth and Crocker, where Rick was waiting, Barbara handed Rick the narcotics.

Appellant argues that the evidence is "fatally incompleted" as it has not excluded the hypothesis that John returned to the car with defendant and that the transfer occurred at the passenger side of the vehicle, out of the view of the agents. We respectfully submit that this is simply not the case. At this crucial moment in the transaction, the agent testified that the car was under constant surveillance [R. T. p. 155:12-25; p. 156:1-7]; there were no gaps in the surveillance such as occurred in the case relied upon by appellant, United States v. Saunders, 325 F.2d 840 (6th Cir. 1964). Moreover, the agents were located on "a hill where you can look down on to where the Studebaker was parked" [R. T. p. 147:17-20]. The testimony further established that John was on the passenger side of the vehicle [R. T. p. 56:7-12; p. 84:1-5, 16-19; p. 147:1-3; p. 157:6-12; p. 186:1-13; p. 204:10-11; p. 205:7-10] and the surveilling agent was able to observe John get out of the car [R. T. p. 147:21-23]. Thus the agent clearly was able to see the passenger side of the car. We therefore submit that, assuming as we must, that the jury believed the surveilling agent, the evidence excludes all hypotheses that the transaction occurred on the passenger side of the vehicle, out of view of the surveilling agents, as proposed by appellant. As this Court said in Barnard v. United States, 342 F.2d 309 (9th Cir. 1965), at p. 317:

"We assume that the jury believes the . . . government

witness. It is for the jury, not this court, to decide what witnesses to believe."

C. THE DISTRICT COURT DID NOT ERR IN INSTRUCTING THE JURY ON CONSTRUCTIVE POSSESSION.

The court charged the jury as to both actual and constructive possession. Mathes, "Jury Instructions", 27 F.R.D. 39, 169 (No. 24.09) (Mathes) [C.T. p. 19; R.T. p. 286:5-25]. Defendant now objects to this instruction for the first time.

1. Any Objection to This Instruction Was Waived by Failure of Trial Counsel to Object.

A search of the record in this case failed to disclose any objection to the instruction on constructive possession. Such failure to object is a complete waiver.

White v. United States, 315 F.2d 113 (9th Cir. 1963), cert. denied 375 U.S. 821 (1963);

Walker v. United States, 298 F.2d 217 (9th Cir. 1962);

O'Neal v. United States, 310 F.2d 175 (9th Cir. 1962).

The reasoning in the White case is particularly appropriate here:

"No point is made that the instruction is an

incorrect statement of the law, merely that it is not applicable to the facts of this case. Under such circumstances, it is peculiarly defense counsel's obligation to make timely objection." White v. United States, supra, p. 115.

2. The Evidence Warranted an Instruction on Constructive Possession.

Assuming, arguendo, appellant's contentions were to be believed that John delivered the narcotics to Barbara Rodriguez, the evidence independently establish constructive possession of the narcotics in appellant. According to the testimony of both Barbara Rodriguez and "Rick" Estrada, it was defendant who set the price for the sale [R. T. p. 49:15-16; p. 101:10-15; p. 108:1-5]. And it was defendant who directed the travels to downtown Los Angeles. Moreover, Barbara Rodrigues, "Rick" Estrada, and Agent Saiz all testified to the nature of defendant's discussion with Rick concerning the transfer of the money [R. T. p. 54:12-18; p. 82:23-25; p. 83:1-12; p. 117:18-25; p. 118:1-6, 10-14, 21-25; p. 119:1-5; p. 163:22-25; p. 164]. Agent Saiz' testimony concerning this discussion is particularly clear that defendant was the principal figure in the transaction and was exercising at that time his dominion and control over the narcotics:

" . . . he told Mr. Estrada that he would have to have the money before he could make delivery of

the heroin. . . . He told Mr. Estrada that the heroin was there, that it would not take much more than fifteen minutes to get the heroin." [R. T. p. 164: 6-11].

This is certainly not the attitude of a go-between who is merely putting a buyer in contact with a seller. Rather, we submit, this conversation makes obvious that defendant at that time had the power either to produce the narcotics (as he ultimately did) or to cancel the transaction, depending only upon whether or not Estrada was then and there willing to pay the price defendant was asking. Facts of a less compelling nature have previously been held by this Court to warrant affirmance where constructive possession was an issue.

Cellino v. United States, 276 F. 2d 941 (9th Cir. 1960);

Dolliver v. United States, ___ F. 2d ___ (9th Cir., June 16, 1967, No. 21,320).

VI

CONCLUSION

In view of the foregoing, the District Court committed no error in refusing to give the appellant's proposed special instruction on entrapment. The facts warrant a finding of actual possession and sufficient facts existed to establish constructive possession. Therefore we respectfully submit that the judgment of conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert M. Talcott
ROBERT M. TALCOTT